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SULAIMAN MAT TEKOR & ORS

v.

NATIONAL POPULATION AND FAMILY DEVELOPMENT BOARD

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-21-20-2000]
31 OCTOBER 2008

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ADMINISTRATIVE LAW: *Statutory bodies - Employment grade - Salary scale - Plaintiffs/employees dissatisfied with salary scale - Complaint made after 32 years - Option papers willingly signed at material time - Whether plaintiffs had reasonable cause of action - Whether plaintiffs discharged legal burden that they were wrongfully placed in salary scale - Harun Salary Scheme - Cabinet Committee Report Salary Scheme*

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The plaintiffs were first employed by the defendant statutory body as Field Assistants. Their employment was governed by contracts of service with the defendant. Later they were promoted as Assistant Information/Publication Officers. The plaintiffs were then under a domestic salary scheme ('Domestic Salary Scheme') with the defendant. Subsequently in 1975, the defendant adopted the Harun Salary Scheme wherein the salary scale was determined by the employees' academic qualifications. As the plaintiffs did not possess any degree qualifications, they were offered the salary scale grade of B13-4. They accepted the option offered and the post of information/publication officers. Then in 1977, the Cabinet Committee Report Salary Scheme ('CCR Salary Scheme') was implemented as the government decided to have a single service and salary scheme for government and statutory authorities. The defendant issued option papers to its employees and the plaintiffs accepted the offer and signed the said papers. They were placed in the B11 salary scale of the CCR Salary Scheme. Subsequently, the government issued two other service circulars ('two service circulars') which the defendant did not adopt and implement. The two service circulars placed information officers in the Ministry of Information in the A22 salary scale of the CCR Salary Scheme that was a higher salary scale than the one the plaintiffs were in. The officers in the A22 salary scale did not possess degree qualifications but held the post of information officers for at least five years. The plaintiffs contended that the defendant should have implemented the two service circulars for the benefit of its employees, in particular, the plaintiffs so that they too could be placed in the A22 salary scale. The plaintiffs claimed that their scope of work was similar to that of the information officers in the Ministry

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of Information and that they had satisfied the requisite number of years of service as stipulated in the two service circulars. Hence, the plaintiffs' action against the defendant. The parties agreed that there was only one main issue to be tried, namely, whether the defendant was right in law in placing the plaintiffs in the CCR Salary Scheme of B11 instead of A22.

Held (dismissing the action):

(1) The plaintiffs failed to disclose any reasonable cause of action. The plaintiffs' witness himself admitted that as the plaintiffs were in the B13-4 salary scale under the Harun Salary Scheme, they were only entitled to the B11 salary scale under the CCR Salary Scheme. (para 24)

(2) The plaintiffs did not object when they were placed in the B13-4 salary scale upon conversion to the Harun Salary Scheme from the Domestic Salary Scheme. On the contrary, they willingly signed the option papers offered to them by the defendant in 1975. It was only now at this trial, 32 years later, that the plaintiffs complained of being placed in the B13-4 salary scale under the Harun Salary Scheme. Likewise they did not object when they were placed in the B11 salary scale upon conversion to the CCR Salary Scheme thereafter. They willingly signed the option papers then too. Furthermore, the plaintiffs' witness agreed that the two service circulars were not applicable to the plaintiffs but only applicable to certain categories of employees in the government sector. The defendant's witness too said in evidence that the two service circulars were not meant to be applicable to statutory bodies but were meant to be applicable to government employees under a Suffian Salary Scheme. (paras 25, 26, 27 & 28)

(3) There was nothing in law that compelled the defendant to adopt the two service circulars. The evidence showed that the government did not intend to apply the two service circulars to the defendant but to those under the Suffian Salary Scheme. In view of the contractual nature of the plaintiffs' employment with the defendant and the fact that the defendant was a separate legal entity *vis-a-vis* the Federal Government, the question whether the defendant was right in not applying the two service circulars to the plaintiffs was strictly a moral rather than a legal issue. (para 29)

(4) The issue that the plaintiffs should have been placed in the higher A11-9 salary scale upon converting to the Harun Salary Scheme should not be raised since the plaintiffs did not plead it in the statement of claim. Secondly, that issue did not come within the

agreed main issue to be tried. Thirdly, the issue was brought up for the first time in trial after 32 years. In any event, the plaintiffs did concede that they were correctly placed in the B13-4 salary scale under the Harun Salary Scheme. Also, witnesses from both parties agreed that the plaintiffs were correctly placed in the B13-4 salary scale since they did not have any degree qualifications. (paras 30, 31 & 32)

(5) The plaintiffs' argument that they did not sign the option papers with full awareness of the implications when accepting the Harun Salary Scheme must be rejected. That allegation was not pleaded. Further, it was not an agreed main issue to be tried. In addition, the plaintiffs, in re-examination, did confirm that the conversion formula was correct and found no problems with their conversion to the said scheme. (para 33)

(6) The *jumud* issue ought not to be raised since it was not pleaded. In any event, there was evidence to show that the holder of a *jumud* post would not be deprived of any promotion or be placed in a less favourable position in terms of career advancement simply for the reason that he held a *jumud* post. (para 35 & 36)

(7) The legal burden was on the plaintiffs to prove on a balance of probabilities that they were wrongfully or unlawfully placed in the B13-4 salary scale under the Harun Salary Scheme. The plaintiffs failed to discharge the burden. They did not plead in their statement of claim that their conversion to the B13-4 salary scale was erroneous or unlawful. On the contrary, the evidence showed that they were correctly placed thereunder. Even if the plaintiffs were unlawfully or erroneously placed, it was too late now for the plaintiffs to complain. The plaintiffs signed the option papers in 1975. They did not protest against that placement for 32 years. As such, they had acquiesced to the act of the defendant in placing them in the B13-4 salary scale. (paras 40 & 41)

Case(s) referred to:

Country Heights Holdings Bhd v. Rating Agency Malaysia Bhd [2008] 8 CLJ 301 HC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 132, 135, 136, 146
Population and Family Development Act 1966, ss. 3, 5(1)(g)

For the plaintiffs - S Kanawagi (Riza Makhzan & Dinesh Kanawagi with him); M/s Khana & Co
For the defendant - Karlos Israphil (Seira Sacha with him); M/s Zaid Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] The plaintiffs are employees of the defendant. They currently hold the posts of information/publication officers in the defendant's establishment.

[2] The defendant is a statutory authority/body established under an Act of Parliament, namely, the Population and Family Development Act 1966 (Revised 1988) ('the Act'). Under s. 3 of the Act, the board of the defendant ('the board') is known by the name of 'National Population and Family Development Board'. The board is established as a body corporate with a perpetual succession and a common seal. Like any other typical statutory authority/body, the board may sue and be sued, may enter into contracts, including employment contracts with its employees; and may hold property. In other words, the board, like any other corporation, is clothed with a legal personality.

[3] Statutory bodies (or statutory authorities) are entities which are, legally speaking, largely (but not absolutely, as they are subject to some degree of ministerial control) independent of the government. Employees of statutory bodies are not public servants in the sense that they do not belong to the public services under art. 132 of the Federal Constitution. As such, they do not enjoy the protection of arts. 135, 136 and 146 of the Federal Constitution. Their contracts of service are not with the Federal Government, but with the respective statutory authorities. Although for the sake of uniformity it is the Federal Government policy that statutory authorities are to adopt service circulars issued by the Public Service Department ('the PSD' – a very important department of the Federal Government that manages and controls services matters pertaining to government employees of all ranks) in cases where such Circulars are intended to apply to statutory bodies, nevertheless, such service circulars do not automatically apply to such bodies. Hence, in the case of the defendant, for example, for any service circular issued by the Public Service Department to apply to the defendant, the board must first adopt that service circular by way of regulations.

[4] Pursuant to s. 5(1)(g) of the Act, the defendant may employ 'such officers and servants as may be necessary on such terms as may be approved by the Minister for carrying out the powers, functions and duties of the board'. It is important to note (to avoid any misconception) that under this s. 5(1)(g) of the Act the Minister has no power to make regulations pertaining to the terms and conditions of the officers and servants of the board. The authority vested with the powers to make such regulations is the board itself. The Minister is merely

conferred with the power to approve or not to approve the regulations made by the board. This means that until it is approved by the Minister, any regulations made by the Board pertaining to the terms and conditions of service of employees of the defendant are of no legal effect.

[5] The 13 defendants are unhappy with the employment grade they are in. They are seeking against the board for a declaration that they are entitled to be emplaced in the higher salary scale, that is, salary scale A22 instead of the lower salary scale, that is, salary scale B11, when the board adopted the Cabinet Committee Report Salary Scheme ('the CCR Salary Scheme').

Domestic Salary Scheme

[6] In order to appreciate the nature of the plaintiffs' alleged grievance, we have to go back in time to the point when they were first employed by the board. Originally, they were recruited by the board as Field Assistants. Later they were promoted as Assistant Information/ Publication Officers (Penolong Pegawai Penerangan/Penerbitan). The plaintiffs were then under a domestic scheme known as Peraturan-Peraturan dan Kaedah-Kaedah mengenai Pengambilan, Perlantikan dan Naik Pangkat 1969 ('the Domestic Salary Scheme'). Their salary scale under this domestic salary scheme is known as the division three salary scale.

[7] In the present case, a significant fact is that none of the plaintiffs possess any university degree.

The Harun Salary Scheme

[8] The Royal Commission on the Remunerations and Conditions of Service in Local Authorities and Statutory Authorities under the chairmanship of the Hon. Justice Harun Hashim ('the Harun Commission' or 'the Harun Report') was established to standardize the service and salary schemes of statutory bodies and local authorities. The recommendations of the Harun Commission's Report were implemented by the defendant on 1 January 1975. Employees of the defendant were issued with option papers. Under the Harun Salary Scheme, the salary scale is determined by the employee's academic qualification. The plaintiffs, as said earlier, did not possess any degree qualification. Hence, they were offered the salary scale Grade B13-4. The plaintiffs accepted the option offered. Under the Harun Salary Scheme, their post is known as Pegawai Penerangan/Penerbitan.

The Cabinet Committee Salary Scheme

[9] In 1976 the Federal Government decided to have a single service and salary scheme for the public sector, that is to say, for both the government as well as for the statutory bodies (and local authorities).

[10] Hence the CCR Salary Scheme was implemented by the Public Services Department and by the statutory bodies (as well as local authorities), including the defendant, on 1 July 1977.

[11] The outstanding difference between the CCR Salary Scheme and the Harun Salary Scheme is that, under the latter, appointments and promotions are based purely on academic qualification. For example, only those with a diploma may be appointed to a category B post; and only those with university degree or equivalent, including professional qualification, may be appointed to a category A post.

[12] The defendant did adopt and implement the PSD's Service Circular of 1977. This circular directs all Government Departments and statutory authorities to adopt the CCR Salary Scheme. The defendant issued option papers to its employees on 1 May 1977. Every employee must state and sign in the option paper as to whether or not he/she accepts the CCR Salary Scheme.

[13] All the plaintiffs accepted the offer and duly signed the option papers and were emplaced in the B11 salary scale of the CCR Salary Scheme.

[14] Subsequently the government issued two other circulars, namely, Service Circular No. 6/77 on 2 June 1977 and Service Circular No. 23/77 on 26 September 1977 through the Public Service Department. These circulars emplaced Information Officers in the Ministry of Information on the A22 salary scale of the CCR Salary Scheme, although these officers do not have a degree qualification, provided these officers have been holding the post of information officer for at least five years.

[15] The plaintiffs' discontent arose after the issuance of these two PSD's Circulars.

[16] What happened was that the defendant did not implement these Service Circulars No. 6/77 and No. 23/77.

[17] The plaintiffs contend that the board should have implemented these service circulars for the benefit of the employees of the defendant, in particular, the plaintiffs, so that they too could be emplaced on the A22 salary scale. The plaintiffs claim that their scope of work is similar

to that of the Information Officers in the Ministry of Information and that they have satisfied the requisite number of years of service as stipulated in the circulars.

[18] Hence, the plaintiffs commenced this writ action against the defendant.

[19] The learned counsel for the defendant, Encik Karlos Israphil, submits that the plaintiffs have no cause of action against the defendant unless the plaintiffs could show that the defendant by placing the plaintiffs in salary scale A22 in the CCR Salary Scheme has committed a breach of the service contract between the plaintiffs and the defendant. Counsel submits that the plaintiffs have failed to do so.

[20] At the conclusion of the trial, I dismissed the plaintiffs' claim with costs.

[21] I shall now give my grounds.

[22] During case management, parties agreed that there shall be only one main issue to be tried, namely:

> On implementing the Cabinet Committee Report Scheme, 1977 on 1.7.77, was the Defendant right in law in placing the Plaintiffs in the Cabinet Committee Report salary scheme of B11; or, whether the Defendant should have placed the Plaintiffs in Cabinet Committee Report salary scheme of A22?

[23] I shall in this judgment be referring to the above issue as the agreed main issue to be tried.

[24] Having heard the evidence and the submissions, I am satisfied that the plaintiffs have failed to disclose any reasonable cause of action. I so hold because the plaintiffs' witness (Encik Ahmad Nizar – PW1) himself admitted in cross-examination that, as the plaintiffs were in the B13-4 salary scheme under the Harun Salary Scheme, they were therefore only entitled to be converted to the B11 salary scale under the CCR Salary Scheme. I shall refer to his evidence:

> Q: Based on the conversion table provided at page 205, do you agree that since the plaintiffs were in the B13-4 salary scheme under Harun Salary Scheme they were therefore only entitled to be converted to B11 salary scheme under the Cabinet Committee Report 1977 salary scheme?
>
> A: Based on this formula, I agree.

[25] Now, an important observation is that the plaintiffs never objected when, upon conversion from the domestic salary scheme to the Harun Salary Scheme, they were emplaced in the B13-4 scale. On the contrary they willingly signed the option papers offered to them by the defendant in 1975. They never challenged the legality of being emplaced on the salary scale B13-4 when converting from the domestic salary scheme to the Harun Salary Scheme. It is only now at this trial (32 years later!) that the plaintiffs are complaining that they should not have been placed in the B13-4 scale under the Harun Salary Scheme. With respect, I think it is rather too late for them to complain.

[26] Likewise, they never objected when under the CCR Salary Scheme they were emplaced on the B11 salary scale. They willingly signed the option papers. This is what PW1 said in evidence:

> Q: Based on the same formula as provided at page 205, A1, do you also agree that the plaintiffs were not entitled to be placed in Grade A22 scale under the new Cabinet Committee Report scheme?
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> A: At the time of the option, yes. But our grievances are after the issuance of Circulars 6/77 and 23/77.
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> Q: Do you agree that after the plaintiffs have accepted the option, the defendant had in fact followed and applied the conversion formula as contained at page 205?
>
> A: Yes, at the time of the option we greed. The issue came out earlier after the issuance of Circulars No. 6/77 and 23/77.

[27] It is to be observed that the witness makes reference to two government circulars, namely, Circular No. 6/77 and Circular No. 23/77. Yet the witness in evidence agrees that Circulars No. 6/77 and 23/77 were not applicable to them but only applicable to certain categories of employees in the government sector. When asked:

> Q: Are you of the view that the Government had acted unfairly or unreasonably against the plaintiffs when Circulars No. 6/77 and 23/77 were not made applicable to them?

the witness answered:

> A: I think the Government is very fair. But here I think the defendant is not sensitive to the welfare of the staff and I think the Information Officers have sacrificed and have the experience but not a university degree.

[28] At this juncture it is important to take into account the evidence of the defendant's witness, Encik Adzhar bin Ismail (DW1) an administrative officer of the Human Resources Department of the defendant. He said in evidence that the two service circulars were not meant to be applicable to statutory bodies: they were meant to be applicable to government employees under the Suffian Salary Scheme.

[29] In my judgment there is nothing in law that compels the defendant to adopt these two service circulars. To my mind, as the government did not intend the two service circulars to apply to the defendant, but to only those under the Suffian Salary Scheme (the service scheme established following the recommendations of the Royal Commission on the salaries and conditions of service of government employees chaired by the Hon. Justice Mohd Suffian Hashim), in view of the contractual nature of the plaintiffs' employment with the defendant, and taking into account the fact that the defendant is a separate legal entity *vis-a-vis* the Federal Government, the question as to whether it was right or not for the Defendant in not applying the two PSD's Circulars to the plaintiffs is strictly a moral issue rather than a legal issue.

[30] Now, going back to the Harun Salary Scheme, the learned counsel for the plaintiffs, Encik Kanawagi, submits that in adopting the Harun Salary Scheme the defendant erroneously and unlawfully emplaced the plaintiffs in the B13-4 scale. The learned counsel for the plaintiffs contends that the plaintiffs should have been emplaced in the A11-9 salary scale (a higher salary scale) upon converting to the Harun Salary Scheme. With respect, this issue cannot be raised by counsel. Firstly, this issue is not pleaded in the statement of claim. Secondly, this is not an issue that comes within the agreed main issue to be tried. Thirdly, as submitted by the learned counsel for the defendant, Encik Karlos Israphil, in his written submission:

> Isu berkenaan peletakan Plaintif-Plaintif dalam tangga gaji B13-4 di bawah Skim Suruhanjaya Harun hanya ditimbulkan buat kali pertama kali oleh Plaintif-Plaintif semasa perbicaraan (dalam tahun 2007), setelah 32 tahun berlalu semenjak opsyen itu di terima dalam tahun 1975.

[31] In any event the plaintiffs themselves in their evidence through PW1 have conceded that they have been correctly emplaced in the B13-4 salary scale when converting to the Harun Salary Scheme. This is what PW1 said in evidence:

> Q: I put it to you that the plaintiffs were aware that if they accepted the conversion to the Harun Salary Scheme they would be placed on the Grade B13-4, as in page 82 of A4?

A: yes.

Q: I put it to you that the plaintiffs never challenged their placement into Grade B13-4 after conversion to Harun Salary Scheme.

A: I agree we did not challenge at that time.

[32] The position taken by PW1 in his evidence above is consistent with the position taken by the defendant's witness, DW1 (which I accept), that since the plaintiffs did not have any degree qualification they ought to be emplaced in the B13-4 salary scale when converting to the Harun Salary Scheme. DW1 further clarified in evidence – and, in my view, correctly - that the plaintiffs could not be emplaced in the A11-9 salary scale when converting to the Harun Salary Scheme because the post of 'publication officer' that appears in the salary scale of A11-9 is only meant for those officers with a degree qualification.

[33] Encik Kanawagi also submits that the plaintiffs did not sign the option papers with full awareness of the implications because the plaintiffs when accepting the Harun Salary Scheme salary scale of B13-4 were neither consulted nor explained before they signed the option papers. With respect, this argument must also be rejected. This allegation (of not being consulted or explained) is not pleaded. It is also not an agreed main issue to be tried. Even in re-examination the plaintiffs, in their evidence, said that the conversion formula was correct and that they found no problem with the conversion to the Harun Salary Scheme's scale of B13-4. This is what PW1 said in re-examination:

Q: Did the defendant in converting from the Harun Scheme to the Cabinet Committee Report 1977 Scheme consult or explain to the plaintiffs the new formula for conversion?

A: No.

Q: If the plaintiffs were not consulted or explained the formula, why did the plaintiffs accept the defendant's formula as the correct one?

A: As I told earlier, I accepted the option in good faith.

Q: How do you know that the conversion formula undertaken by the defendant is a correct one?

A: Through the option papers that were given to me.

…

Q: Why did the plaintiffs accept the defendant's formula to convert from the domestic scheme to the Harun Service Scheme as the correct one?

A: We accepted it in good faith.

Q: After the Harun Service Scheme was accepted and implemented, did you find any fault or problem with that scheme?

A: No.

[34] In evidence and submission the plaintiffs also raised the '*jumud*' argument. The plaintiffs' complaint is that, with the adoption of the CCR Salary Scheme by the defendant, the plaintiffs' posts in the Harun Salary Scheme (with the B13-4 salary scale) in the defendant's establishment have become '*jumud*' meaning that the posts have become 'static' or 'superseded'. The plaintiffs' *jumud* posts, however, were not immediately abolished with the implementation of the conversion. What would happen to the plaintiffs' existing posts under the Harun Salary Scheme upon the defendant adopting the CCR Salary Scheme is this. The holder of the *jumud* post (with the B13-4 salary scale), since he did not opt for the CCR Salary Scheme, is allowed to continue in his employment under the existing B13-4 (Harun Salary Scheme) scale. However, his post becomes *jumud* meaning that once he resigned or retired or his service is terminated, his post will be abolished. The plaintiffs allege that as their posts under the Harun Salary Scheme have now become *jumud* it was pointless for them to remain in the posts as to do so would place them in a less favourable position as compared to those who opted for the new B11 salary scale under the CCR Salary Scheme. They claim that they would lose out in terms of promotion and career advancement. They argue that this being the case they had no choice but to accept the option to convert to the B11 salary scale under the CCR Salary Scheme. In other words, it is the plaintiffs' contention that they were 'forced' to sign the option papers in favour of the CCR Salary Scheme with the salary scale of B11.

[35] With respect, in my judgment, this *jumud* issue ought not to have been raised as it is not pleaded in the statement of claim.

[36] In any event there is the evidence of DW1 (which I accept) that the holder of a *jumud* post will not be deprived of any promotion or be placed in a less favourable position in terms of career advancement simply by reason of the fact that the post he holds is a *jumud* post.

[37] In the final analysis (putting aside for the moment the issue pertaining to the two PSD's Service Circulars) it appears to be common ground that if the plaintiffs were correctly placed in the B13-4 salary scale under the Harun Salary Scheme then they are also correctly placed in the B11 salary scale under the CCR Salary Scheme upon conversion to the latter scheme.

[38] Thus, essentially the question is: Were the plaintiffs correctly placed in the B13-4 salary scale when the defendant converted from the domestic salary scheme to the Harun Salary Scheme? If the answer is in the affirmative, then (again putting aside for the moment the issue of the two PSD Service Circulars) the plaintiffs were correctly emplaced in the B11 salary scale upon conversion to the CCR Salary Scheme.

[39] The plaintiffs' position appears to be somewhat inconsistent. In his evidence PW1 states that the plaintiffs were correctly emplaced in the B13-4 salary scale when converting to the Harun Salary Scheme. But Encik Kanawagi, in his written submission, contends that the emplacement was erroneous and unlawful.

[40] The legal burden is on the plaintiffs to prove on a balance of probabilities that they were wrongly or unlawfully emplaced in the B13-4 salary scale by the defendant under the Harun Salary Scheme. In my judgment, the plaintiffs have failed to discharge this burden. In fact, in the first place, the plaintiff never pleaded in their statement of claim that their emplacement in the B13-4 salary scale under the Harun Salary Scheme was erroneous or unlawful. It is elementary that parties are bound by their pleadings. Indeed, on the contrary, their evidence, as I have referred to above, suggests that they were correctly emplaced in the B13-4 salary scale under the Harun Salary Scheme.

[41] In any event, on the supposition that they were unlawfully or erroneously emplaced in the B13-4 salary scale under the Harun Salary Scheme, as a matter of law it is now too late for the plaintiffs to complain. The plaintiffs by signing the option papers way back in 1975 and by doing nothing positive thereafter for 32 years to protest against that emplacement, have acquiesced to the act of the defendant in placing them in the B13-4 salary scale. In *Country Heights Holdings Bhd v. Rating Agency Malaysia Bhd* [2008] 8 CLJ 301, I state the following principle (at p. 305):

> It is a principle of law that where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise have abstained from it, to believe that he assents to its being committed, that person (who stands by) has acquiesced to that act; and that person so standing by cannot afterwards be heard to complain of the act (see *Halsbury's Laws of Malaysia*, Vol. 26, 2005, *Malayan Law Journal*, p. 555, para 450.402).